**APPENDIX A**

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

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No. 91-10612

PEOPLE OF THE TERRITORY OF GUAM
*Plaintiff-Appellee,*
vs.
DANIEL LUCIEN TURNER
*Defendant-Appellant.*

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No. 91-10624

vs.
MARTIN M. VILORIA
*Defendant-Appellant.*

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No. 92-10002

vs.
JOHN GOKITA MANIBUSAN
*Defendant-Appellant.*

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ORDER
[Filed February 24, 1993]

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Before BROWNING, NORRIS and REINHARDT, Circuit Judges.

The petition for rehearing is denied.

The Attorney General argues that our decision is in conflict with Guam law that a "two-inference" instruction should not be given in a case involving direct evidence. *People v. Wright*, 276 Cal. Rptr. 731, 755-56 (1991); *Guam v. Yang*, 850 F.2d 507, 513 (9th Cir. 1988) (en banc) (California law applies in interpreting Guam instruction on reasonable doubt). We agree that such an instruction should not be given. While the two-inference instruction accurately describes reasonable doubt, see *United States v. Miller*, 688 F.2d 652, 662 (9th Cir. 1981); *United States v. Grayson*, 597 F.2d 1225, 1230 (9th Cir. 1979); *United States v. James*, 576 F.2d 223, 227 (9th Cir. 1978), Guam, like many jurisdictions, refuses to give the instruction because it is confusing. See *Wright*, 276 Cal. Rptr. at 755-56; *United States v. Kahn*, 821 F.2d 90, 93 (2d Cir. 1987); *1 Sand, Siffert, Loughlin & Reiss, Modern Federal Jury Instructions* ¶4.01 at 4-15 (1992). However, the question before us was not whether such an instruction should have been given, but whether defendants were prejudiced by the court's instruction to the jury that defense counsel had incorrectly stated the law when he described the two inference rule.

**APPENDIX B**

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

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No. 91-10612

PEOPLE OF THE TERRITORY OF GUAM
*Plaintiff-Appellee,*
vs.
DANIEL LUCIEN TURNER
*Defendant-Appellant.*

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No. 91-10624

vs.
MARTIN M. VILORIA
*Defendant-Appellant.*

---

No. 92-10002

vs.
JOHN GOKITA MANIBUSAN
*Defendant-Appellant.*

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MEMORANDUM*
[Filed December 16, 1992]

Appeal from the United States District Court
for the District Court of Guam, Appellate Division

Argued and Submitted November 3, 1992
Honolulu, Hawaii

Before BROWNING, NORRIS and REINHARDT, Circuit Judges.

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* This disposition is not appropriate for publication and may not be cited to or for the courts of this circuit except as provided by 9th Cir. R. 36-3.

Daniel Turner, Martin Viloria and John Manibusan were indicted for aggravated murder, burglary, robbery, and possession and use of a deadly weapon in the commission of a felony. Their first trial ended in a mistrial because the jury was unable to reach a verdict. On retrial, Turner, Viloria and Manibusan were convicted on all counts. The District Court of Guam, Appellate Division, affirmed the convictions, finding the trial court's errors harmless. We conclude the erroneous instruction regarding reasonable doubt was not harmless and address some of appellants other claims to provide guidance on retrial.

1. Reasonable Doubt

The trial court plainly erred by instructing the jury that defense counsel's statement in closing argument as to the meaning of reasonable doubt was not an accurate statement of law. Defense counsel told the jury that if the evidence reasonably permitted either a conclusion of guilt or a conclusion of innocence the jury must find for the defendants. The argument reflected the "two inference instruction," which, although criticized, see, e.g., *1A Sand, Siffert, Loughlin & Reiss, Modern Federal Jury Instructions* ¶ 4.01 at 4-15 (1992), is a correct statement of Ninth Circuit law. *United States v. James*, 576 F.2d 223, 227 n.3 (9th Cir. 1978). The only question is whether the court's error was harmless.[1]

The importance of an accurate instruction on reasonable doubt, and the presence of circumstances aggravating the error in this case, compel the conclusion that "there is a reasonable possibility that the error materially affected the verdict." *United States v. Valle-Valdez*, 554 F.2d 911, 915 (9th Cir. 1977) (emphasis in original). See also *United States v. Rubio-Villareal*, 967 F.2d 294, 296 n.3 (9th Cir.

[1] We reject the State's contention that this claim was not properly preserved for appellate review. Appellants did not make a record of the counsel's exact statement as written on a courtroom blackboard, but the substance of counsel's statement was repeated to the jury and recorded in the trial transcript.

1992). The prosecution's evidence was strong but not so decisive as to alter this conclusion.[2]

We have said "a conviction should not rest on ambiguous and equivocal jury instructions on a basic issue." *United States v. Washington*, 819 F.2d 221, 226 (9th Cir. 1987). No issue is more basic than whether guilt has been proven beyond a reasonable doubt. The reasonable doubt standard "is indispensable to command the respect and confidence of the community in applications of the criminal law." *In re Winship*, 397 U.S. 358, 364 (1970). Accordingly, we have said a reasonable-doubt charge must "fairly and accurately convey the meaning of a reasonable doubt." *United States v. Wosepka*, 757 F.2d 1006, 1008 (9th Cir. 1985). The charge in this case, taken as a whole, did not "fairly and accurately convey the meaning of a reasonable doubt." Rather, it suggested to the jury that if torn between two equally reasonable hypotheses it could still convict.

The effect of the court's error was aggravated by other circumstances. Because the error was made during summations, the erroneous instruction was the court's last statement to the jury regarding reasonable doubt. Moreover, the prosecutor reinforced the error by repeating it in his rebuttal summation, and by erroneously advising the jury that defendant's accurate statement of law applied only to circumstantial evidence and was inapplicable to this case because the prosecution had produced direct evidence of guilt.[3]

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[2] The primary witnesses were cooperating accomplices who had an interest in currying favor with the government. As noted above, the first trial ended with a hung jury. *United States v. Schuler*, 813 F.2d 978, 982 (9th Cir. 1987) (prior hung jury is a factor in determining whether error is harmless beyond a reasonable doubt).

[3] In finding the error harmless, the District Court, Appellate Division stated that defense counsel precipitated the error by using an instruction that had not been approved by the court. The prosecutor was equally at fault for exacerbating the trial judge's mistake.

2. Hostile Witness

The trial court's ruling that the prosecution's witness, John Manibusan, was a hostile witness and that the prosecutor therefore could use leading questions in his examination, fell within the court's broad discretion under Guam Rule of Evidence 611(c). 6 Guam Code. Ann. § 611(c) (1987). See also *Miller v. Fairchild Indus., Inc.*, 876 F.2d 718, 734 (9th Cir. 1989) (quoting McCormick on Evidence at 12 (1984)). John Manibusan was plainly a hostile witness. He had testified for the prosecution in the first trial, but completely renounced his previous testimony soon after taking the stand in the present trial. (Tr. Vol. I at 81).

3. Impeachment with Prior Inconsistent Statements

We respectfully disagree with the conclusion of the Appellate Division that no error occurred in the prosecutor's use of prior inconsistent statements made by John Manibusan to Paul Suba and Claudia Manibusan to impeach John Manibusan's trial testimony.

Because the prior statements were admissible only for impeachment and not as substantive evidence, 6 Guam Code Ann. §§ 613(b), 801(d)(1)(A), the trial court should have advised the jury "at the time the prior inconsistent statement[s] [were] admitted: and again at the end of trial, that "the statement[s] may be considered only as bearing on credibility." *United States v. Ragghianti*, 560 F.2d 1376, 1381 (9th Cir. 1977) (quoting *Bartley v. United States*, 319 F.2d 717, 719 (D.C. Cir. 1963). No instruction was given when Claudia Manibusan and Officer Suba testified as to the prior statements by John Manibusan, and although the trial court gave a general instruction at the end of trial that prior inconsistent statements were to be considered solely to determine a witness' credibility, the instruction did not direct the jury's attention to the testimony regarding John Manibusan's statements. (Tr. Vol. X at 32).

Furthermore, if these statements are offered on retrial, the court should consider whether the prosecution is impeaching his own witness' testimony as a "'subterfuge' to get otherwise inadmissible testimony before the jury." *United States v. Crouch*, 731 F.2d 621, 624 (9th Cir. 1984). When a party impeaches its own witness, "'the

maximum legitimate effect of the impeaching testimony can never be more than the cancellation of the adverse answer by which the party is surprised." *Ragghianti*, 560 F.2d at 1381 (quoting *United States v. Cunningham*, 446 F.2d 194, 197 (2d Cir. 1971) (Friendly, J.)). It may be that Manibusan's testimony had already been "cancelled out" by the admission of his testimony at the first trial as substantive evidence, and the only purpose of proving his statements to Suba and Mrs. Manibusan was to corroborate his prior testimony that had already been admitted. The prosecution may demonstrate on retrial, however, that this testimony has additional impeachment value.

3. Expert Witness

The trial court's refusal to permit an attorney to testify as an expert witness to refute Nahalowaa's claim that he had not made any deals in exchange for his testimony was within the trial court's "broad discretion . . . to conclude that, on balance, the jury would not benefit from the admission of the proffered evidence." *United States v. Langford*, 802 F.2d 1176, 1179 (9th Cir. 1986); 6 Guam Code Ann. § 702 (expert testimony admissible if it will "assist the trier of fact"). The jury had sufficient evidence of Nahalowaa's motivation to curry favor with the government. Nahalowaa testified he believed he was an accessory to murder and was afraid he might be charged with that crime. (Tr. Vol. VII at 41). The expert testimony would have been cumulative and of little additional assistance to the jury.

3. False Statements to the Jury

Appellant Viloria argues the prosecutor lied to the jury by stating that Viloria had failed to raise his alibi defense prior to trial.

The alibi rested on defendant Martin Viloria's testimony that he was home with his wife on the night of the murder, (Tr. Vol. IX at 34-58), and Mrs. Viloria's testimony that Martin was with her all night and did not awake until the next morning when she asked him to kill a snake on her kitchen windowsill. Mrs. Viloria testified she remembered the night clearly because she and Martin had been

invited to a barbecue with the other defendants, and had an argument when he refused to go. (Tr. Vol. IX at 17-21).

As the Appellate Division said, if the prosecutor's statement that appellant Viloria had not raised this defense at the first trial was false, it was "false only in a hypertechnical sense." Sip op. at 16. Although Viloria filed a notice of alibi defense prior to the first trial, he did not raise the alibi defense in that trial, and neither he nor his wife testified. Moreover, the thrust of the prosecutor's statement was that the Vilorias had told the story about their argument over the barbecue and the snake incident for the first time at the second trial, and this statement by the prosecutor was true.

4. Prosecutor's Comment on Viloria's Post-Arrest Silence

We respectfully disagree with the Appellate Division's conclusion that no error occurred in connection with the prosecutor's comments on Viloria's failure to raise his alibi defense when he was arrested.

A prosecutor may not comment on a defendant's post-arrest silence when that silence follows Miranda warnings. *Doyle v. Ohio*, 426 U.S. 610 (1976); *United States v. Newman*, 943 F.2d 1155 (9th Cir. 1991). In such circumstances the arrestee's silence is ambiguous because, "in the wake of these warnings, [it] may be nothing more than the arrestee's exercise of these Miranda rights." *Doyle*, 426 U.S. at 617. The Appellate Division found no error on the ground Viloria had waived his Miranda rights by speaking to the police. (Viloria's ER exhibit E at 17).

All Viloria said to the police was that he would cooperate if the police would tell him who had snitched on him. The police advised him they would make no deals, and Viloria then refused to answer any questions. While a defendant waives his Miranda rights by voluntarily speaking to the police after warnings have been given, he may revoke that waiver simply by "indicat[ing] in some manner that he wishes to remain silent." *United States v. Lorenzo*, 570 F.2d 294, 298 n.1 (9th Cir. 1978). This case is indistinguishable from *United States v. Branson*, 756 F.2d 752 (9th Cir. 1985), in which we found a *Doyle*

violation even though the defendant answered some of the officer's questions at the time of his arrest.

5. Prosecutor's Comments on Mrs. Viloria's Silence

Viloria argues that the prosecutor's closing argument included an improper comment on his wife's failure to come forward with her story at the time of his arrest and on her failure to testify in the first trial.[4]

The Appellate Division held the prosecutor's comment on Mrs. Viloria's silence at the time of her husband's arrest was improper because the prosecutor suggested that, if she had advised the police that her husband was with her at the time of murder, he would have been immediately released from prison, and the prosecutor must have known his statement to be false. We agree. *Cf. People v. Lindsey*, 205 Cal. App. 3d 112, 117 (1988).[5] However, the prosecutor's comment on Mrs. Viloria's failure to testify in the first trial was not improper. A prosecutor may comment on the defendant's failure to call witnesses. *United States v. Reyes*, 966 F.2d 508, 509 (9th

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[4] The prosecutor's statement was as follows:

Then we have, also, his wife. As of last week, she didn't seem to have a clue of why she was outside in the hallway waiting to come in. As of March, the only thing she knew was that Martin was home every night, every night. You notice how Martin kind of switched on that?

We then have, back in March, none of this story. None of this story. Would a woman leave her husband . . . in for so long? Yesterday was the first time we heard that. She sat through the whole first trial, listening to all the evidence, as well as Martin. Yesterday is then when we hear it. Would a woman leave the father of her children? The man she's married to, sit in jail and wait until this long, more than a year later, and come forth and say, "Oh yeah. Oh, yeah, this is the story. It wasn't the story in March. It wasn't the story last week, but this is the story." I submit to you that may raise doubt, but, that is not reasonable doubt.

[5] The court held in *Lindsey* that a similar argument was also an improper comment on the defendant's post-arrest silence. We express no opinion on that issue. We merely hold that the prosecutor engaged in prosecutorial misconduct because the implication of his argument was patently untrue.

Cir.1992); *United States v. Castillo*, 866 F.2d 1071, 1083 (9th Cir. 1989).

## Conclusion

Because the trial court's erroneous statement regarding reasonable doubt was not harmless error, the convictions are vacated and the case is remanded for trial.

## APPENDIX C

DISTRICT COURT OF GUAM
TERRITORY OF GUAM
APPELLATE DIVISION

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No. 90-00092A

PEOPLE OF THE TERRITORY OF GUAM
*Plaintiff-Appellee*
vs.
MARTIN MANIBUSAN VILORIA
*Defendant-Appellant*

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No. 90-00094A

vs.
JOHN GOKITA MANIBUSAN
*Defendant-Appellant*

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No. 90-00096A

vs.
DANIEL LUCIEN TURNER
*Defendant-Appellant*

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OPINION
[Filed November 18, 1991]

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BEFORE: MUNSON,* District Judge, GOODWIN,** Senior Circuit Judge, and CROCKER,***

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* Honorable Alex R. Munson, United States District Judge for the District of the Northern Mariana Islands, sitting by designation in accordance with 48 U.S.C. § 1424b(a).

** Honorable Alfred T. Goodwin, Senior United States Circuit Judge for the Ninth Circuit Court of Appeals, sitting by designation in accordance with 48 U.S.C. § 1424b(a).

*** Honorable M.D. Crocker, Senior United States District Judge for the Eastern District of California, sitting by designation in accordance with 48 U.S.C. § 1424b(a).

This is a direct appeal from a judgment of the Superior Court of Guam (Siguenza, J.) sentencing Martin Manibusan Viloria, John Gokita Manibusan, and Daniel Lucien Turner to life imprisonment without possibility of parole and other lesser terms for aggravated murder, burglary, robbery, and possession and use of a deadly weapon in the commission of a felony. Defendants allege at least fifteen instances of reversible error: violations of their Fifth, Sixth, and Fourteenth Amendment rights during the trial itself resulting form argument made by the prosecutor and from decisions made by the judge. Because the court was correct in most instances, because of the overwhelming evidence of guilt, and because under the totality of the circumstances what errors were made were harmless, we conclude that the convictions should be AFFIRMED.

## ISSUES

1. Did the Guam Superior Court improperly rule that principal prosecution witness Joseph G. Manibusan was a hostile witness, who could therefore be asked leading questions?
2. Did the Guam Superior Court err in allowing hearsay impeachment of principal prosecution witness Joseph G. Manibusan by his ex-wife and a police officer?
3. Did the Guam Superior Court abuse its discretion in excluding an attorney as an expert witness?
4. Did the Guam Superior Court err by excluding the statement of James Leon Guerrero for the truth of the matters asserted?
5. Were the in-custody statements of Defendant Viloria improperly put before the jury and argued upon?
6. Did the Guam Superior Court err in allowing prosecutorial closing argument on facts surrounding the alibi?
7. Do the erroneous arguments of counsel warrant reversal?
8. Were the Guam Superior court's jury instructions incorrect under Guam law?

## PROCEDURAL HISTORY

Because these cases arise out of the same facts and were tried together, a consolidated opinion is best suited for these appeals. The alleged crimes occurred on November 8, 1986. Two Guam police

department officers dispatched to a reported disturbance in a residence at Old Perezville found two lifeless bodies with gunshot wounds to the head. Following an investigation, Joseph G. Manibusan began cooperating on May 9, 1989, and implicated the three defendants as participants in the murders.

An indictment was filed in Superior Court of Guam Criminal Case No. CF0145-89 (District Court of Guam appellate Nos. 90-00092A, 90.00094A, and 90-00096A) on June 1, 1989 charging Martin Manibusan Viloria, John Gokita Manibusan, and Daniel Lucien Turner, respectively, each with aggravated murder, burglary, robbery, and possession and use of a deadly weapon in the commission of a felony.

On March 12, 1990, Defendant Viloria gave notice of alibi. The court granted Viloria's motion in limine (joined in by both co-defendants) to exclude his post-arrest statements to police. Decision and Order, April 23, 1990). It also granted the Government's motion in limine to exclude exculpatory statements from certain non-defendants in the defendants' case-in-chief. Decision and Order, May 7, 1990.[1] The first trial of this matter commenced on March 19, 1990 and went to the jury on April 17, 1990. Although the jury reached a guilty verdict, one juror apparently changed her mind when the jury was polled. The first case ended in a mistrial with the jury unable to reach a verdict.

A second judge, who adopted all the pretrial rulings from the first trial, presided over the second trial from July 10-27, 1990. The jury found the three defendants guilty of all counts. Following a pre-sentence investigation, the court imposed sentence on September 24, 1990. Each defendant received life imprisonment without possibility of parole for the murder, 10 years each for the robbery and burglary to run concurrently, and 20 years on the weapons charge, to run consecutively to all the foregoing. Defendant Viloria timely filed a notice of appeal on September 24, 1990, Defendant Manibusan on September 27, 1990, and Defendant Turner on October 2, 1990. Judgement was entered on October 23, 1990.

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[1] Neither Decision and Order was provided to this court by Appellant-Defendants.

Defendant Viloria filed his appellant's brief on August 16, 1991; Turner and Manibusan (incorporating the other two by reference) on September 6, 1991. The Government filed its appellee's brief on October 18, 1991. The Defendant Viloria filed his reply on October 24, 1991.

## FACTS

The evidence against the three defendants ranged from very strong to overwhelming. The testimony of other alleged participants, who had pleaded guilty to the murders earlier, implicated all three defendants in the crime. Another witness, John Naholowaa, dealt with the automobile used in the crime and placed the three defendants and the two cooperating participants at the home when the deaths occurred. Other witnesses substantially corroborated their testimony.

In the course of the trial, the Government called as its first and primary witness Joseph G. Manibusan, who had implicated the defendants. H was one of the two participants in the murders who had pleaded guilty and cooperated with the Government, who were not defendants in this trial. At the first trial he testified for the government against his brother, first cousin, and the third defendant. However, after having been sentenced to 30 years incarceration in a separate proceeding, he refused to testify at the beginning of the second trial. At that time, out of the presence of the jury, the judge and each defendant's counsel questioned him. Later that day, the prosecutor recalled Joseph Manibusan and asked him if he remembered going to the specific house where two people were killed in early November, 1986. Joseph Manibusan replied, "No." The prosecutor then asked, "What is it you do remember?" Manibusan responded, "I don't recall going to anybody's house and killing them." The prosecutor questioned, "you don't, ever?" Manibusan answered, "No." At this point the Government moved and the court granted that Manibusan be designated as a "hostile," witness, thereby subjecting him to leading questions by the Government.

Subsequently, the Government called Joseph Manibusan's ex-wife and a police officer, who made several hearsay statements which were admitted over objection as impeachment. Manibusan

had substantially recanted his original trial testimony adverse to the defendants.

Near the close of testimony, counsel for Defendant Viloria made an offer of proof that a former chief deputy prosecutor for the Attorney General's office, with over 40 criminal jury trials, would answer a hypothetical question as an expert in criminal law. He would opine that a previous Government witness, John Naholowaa, who placed the three defendants and the two cooperating co-defendants at the home when the deaths occurred, could have been indicted on the basis of his testimony. This offer of proof, to impeach Naholowaa's cross-examination testimony that he did not have a deal with the prosecution, was rejected by the judge.

The court also excluded Defendant Viloria's attempt to introduce the out-of-court statement of James Leon Guerrero, adhering to its granting of the Government's motion in limine to exclude exculpatory statements from certain non-defendants in the defendants' case-in-chief. Decision and Order, May 7, 1990. The judge in the first trial had ruled that the exculpatory statement, implicating Defendant John Manibusan and a stranger to the trial, was made under suspect circumstances and was untrustworthy. James Leon Guerrero refused to testify at the trial on Fifth Amendment grounds. After adopting the original ruling and excluding the statement from Defendant Viloria's case-in-chief, the court did allow a redacted version into evidence, with a limiting instruction, for impeachment purposes. (TR Vol. X, 31-32).

The court had granted Viloria's motion in limine to exclude his post-arrest statements to police in the prosecutor's case-in-chief. Decision and Order, April 23, 1990. during the Defendants' case-in-chief the Government elicited from Defendant Viloria his statement to the police that he didn't know anything about the murders and had nothing else to say. Immediately afterward, over objection, the prosecutor asked Viloria if he had offered to make a deal with a police officer to cooperate and tell who was involved in exchange for information about the identity of the "snitch," which Viloria denied. The Government obtained testimony rebutting the denial from one of the three police officers who had been in the vehicle at the time. In closing argument, the Assistant Attorney General argued that willingness to make a deal indicated knowledge and involvement.

Throughout the trial, the Government attacked Defendant Viloria's alibi defense. Although he had filed his notice of alibi as early as March 12, 1990, Defendant Viloria did not call his wife to testify in support of the alibi at the first trial. During the trial and at closing argument, the prosecutor sought to establish that the alibi was recently fabricated. He asked why Defendant Viloria had spoken to the police on some matters, but hadn't mentioned his alibi. He asked why Viloria's counsel had let him remain incarcerated rather than bring the evidence to the police or Attorney General, and said that if he had done so, he wasn't a very good lawyer. He asked why his wife had let her husband the father of her children sit in jail for so long before mentioning the story. The prosecutor aggressively attacked Defendant Viloria's alibi, which was his sole defense, throughout the trial and at closing argument.

During closing argument, the prosecutor made some comments that Defendants' rebuttal witnesses' statements, whose testimony the judge had permitted accompanied by a limiting instruction that it was not introduced for the truth of the matters asserted, "were not the truth." The prosecutor also alluded to Defendant Viloria's arrest record.

During the jury instructions, the judge did not give an instruction that the jury must decide the case solely on the evidence presented in the second trial and must not consider the fact of the first trial in reaching a verdict. During Defendant Manibusan's closing argument, counsel referred to a demonstrative chart listing a jury instruction used in the first trial by rejected in the second and stated:

> Now, if the evidence in this case reasonably permits either of two conclusions, one of innocence, one of guilty [*sic*] --- meaning you look at different sets of facts and you listen to our arguments and you say,
>
> "Well, it could reasonably go that way. I could reasonably see that they've done it. But on the other hand, I could reasonably see that these guys are fabricating and they did come up with a story, that's reasonable. And I listened to the statements made by Cathy Burger and the person labelled 'A' [James Leon Guerrero], and it is reasonable that maybe these guys didn't do it,"

— you don't have a choice. You have to come back with a not guilty verdict. So when you're given a choice between two, and they're both reasonable, you have to come back with a not guilty verdict. Again, that's the law.

The judge interrupted and, after a sidebar, stated that item number four on the chart was not an accurate statement of the law. (TR Vol. X, 148: 1-2).

## STANDARD OF REVIEW

Evidentiary rulings are reviewed for abuse of discretion, *United States v. Tsui*, 646 F.2d 365, 368 (9th Cir. 1981), as are particular jury instructions. *United States v. Aguon*, 851 F.2d 1158, 1161 (9th Cir. 1988). Prosecutorial argument is reviewed according to a "harmless error" standard. *United States v. McKoy*, 771 F.2d 1207 (9th Cir. 1985). Unobjected-to jury instructions are generally reviewed for plain error. *People of the Territory of Guam v. Yang*, 850 F.2d 507, 512 n.8 (9th Cir. 1988).

If the trial court is found to have erred relating to the deprivation of constitutional rights, under the federal constitutional standard enunciated by the Supreme Court, an error may be deemed harmless only if an appellate court is "able to declare a belief that it was harmless beyond a reasonable doubt." *Chapman v. California*, 386 U.S. 18, 24, 87 S.Ct. 824, 828, 17 L.Ed.2d 705, 710-11 (1967).

## ANALYSIS

### HOSTILE WITNESS

Defendants argue that the court improperly ruled that principal prosecution witness Joseph Manibusan was a hostile witness. Leading questions are permitted of hostile witnesses. 6 Guam Code

Annot. § 611(c) (Guam Rules of Evidence).[2] In the immediate prior testimony no extensive foundation established that he was hostile.

However, the brief exchange before he was ruled "hostile" contained evasive and ambiguous testimony clearly in conflict with his previous testimony under oath on March 29, 1990. See, *Thomas v. Cardwell*, 626 F.2d 1375, 1384-86 (9th Cir. 1980). When Joseph Manibusan refused to testify that morning, the judge proceeded to voir dire the witness, followed by each attorney questioning him. After finding the witness "hostile" that afternoon, the judge asked counsel if they wished to voir dire and only one took advantage of the offer. No objections were made to the finding that the witness was "hostile". His previous trial testimony was later admitted in total as substantive evidence without objection. (TR Vol. II, 114: 21). The judge did not abuse his discretion in designating Joseph Manibusan a hostile witness.

## HEARSAY IMPEACHMENT

After Joseph Manibusan recanted his testimony of the first trial, the Government naturally sought to impeach him. The credibility of a witness may be attacked by any party, including the party calling him. 6 Guam Code Annot. § 607. Once a witness is afforded an opportunity to explain or deny a prior inconsistent statement and the opposite party is afforded an opportunity to interrogate him, extrinsic evidence of the prior inconsistent statement is admissible. 6 Guam Code Annot. § 613(b). Here, the evidence was Joseph Manibusan's independent conversations with a police officer and with his ex-wife, corroborating his testimony at the first trial.

Such extrinsic verbal evidence of the witness' prior inconsistent statement will always be hearsay, by definition. Regarding this impeachment of Joseph Manibusan by his ex-wife and a police officer, the judge instructed the jury about the limited purpose of

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[2] The cited Guam Rules of Evidence, Title 6 of the Guam Code Annotated, were adopted from the Federal Rules of Evidence and are interpreted the same as the Federal Rules. *Guam v. Ojeda*, 758 F.2d 403, 406 (9th Cir. 1985).

prior inconsistent statements. The court did not err in allowing the testimony.

## ATTORNEY AS EXPERT WITNESS

Defendant Viloria sought to call a criminal law attorney as an expert witness to opine that prosecution witness John Naholowaa could have been indicted on the basis of his testimony. this offer of proof, to impeach John Naholowaa's statement that he did not have a deal with the prosecution, was for the purpose of attacking his credibility. The attorney was not being called to apply the law to particular facts of this case, which is a prohibited usurpation of the judge's duty. *Downer v. Bramet*, 152 Cal.App.3d 837, 841-42, 199 Cal.Rptr. 830, 832-33 (1984) (Kaufman, J.), but rather to supply a motive for Naholowaa's testimony. However, there was no evidence whatsoever that Naholowaa had any sort of agreement with the prosecution. The credibility challenge ensuing from the proffered opinion would have been mere speculation. Opinion evidence need be admitted only if it will assist the trier of fact. 6 Guam Code Annot. § 607. the judge did not err in exercising his discretion to exclude the attorney would-be expert witness.

## EXCLUSION OF STATEMENT FOR TRUTH OF MATTERS ASSERTED

Defendant Viloria wanted to introduce the out-of-court statement of James Leon Guerrero, implicating Defendant John Manibusan and a stranger to the trial, as part of his case-in-chief for the purposes of exculpating Viloria by implicating others, impeaching Joseph Manibusan's statement made in the first trial, and corroborating his alibi defense. He argues that the statements were admissible under the hearsay rules, and that the Confrontation Clause mandates their admission.

Hearsay statements of a non-defendant are admissible if the declarant is exempted by a ruling of the court from testifying, 6 Guam Code Annot. § 804(a)(1), the statement is against penal interest, 6 Guam Code Annot. § 804(b)(3), and corroborating circumstances clearly indicate the trustworthiness of the statement.

Id.; *U.S. v. Brainard*, 690 F.2d 1117, 1123-25 (4th Cir. 1982). Here, the Judge found that the statement was made under suspect circumstances and was untrustworthy.

Viloria notes that the police officer to whom the statement was made, after the declarant had been arrested and jailed, found it believable because he thought it contained information about the crime scene that only a participant would know. However, another police officer, more knowledgeable of the true facts of the case, concluded form the statement that the declarant was not involved. The court found the latter testimony persuasive, and the conclusion that the statement was untrustworthy as not clearly erroneous. Therefore, whether or not the our expressly referred to 6 Guam Code Annot. § 804(a)(1), after both prosecution and defense had cited it, is irrelevant. Although the corroborating circumstances need not be sufficient to remove all doubt, *Brainard*, 690 F.2d at 1125 n.14, the corroborating circumstances must clearly indicate the trustworthiness of the statement. 6 Guam Code Annot. § 804(b)(3) (emphasis added).

The common law hearsay rule is older than the Constitution. The failure to admit the statement on hearsay grounds does not violate the Defendants' right to confront witnesses. While not admitted to implicate others or corroborate an alibi defense, it was permitted in redacted form for impeachment. Exclusion of James Leon Guerrero's statement for the truth of the matters asserted was not error.

## DEFENDANT VILORIA'S STATEMENTS

Defendant Viloria objects to the use of his post-arrest statements about not knowing of the murders but then trying to bargain with the police, the hearsay statements to that effect after his denial, and the Government's argument thereon.

The prosecutor argued that Viloria's willingness to make a deal indicated knowledge and involvement in the murder. He also pointed out that John Naholowaa had told the police, in tears, that he hadn't come forward earlier because "snitches die." He argued that

upon arrest Viloria had not mentioned a word about his alibi that he had been at home, but only wanted to know about the snitch.

Viloria avers that this introduction of his post-arrest statements and the prosecutor's argument upon it were a blatant violation of the first trial judge's ruling on his motion in limine excluding such statements. Decision and Order, April 23, 1990.[3] However, the second trial judge apparently viewed the exclusion as applying to the prosecutor's case-in-chief only. By taking the stand, Viloria opened the door himself to cross-examination on issues of fabrication and prior inconsistent statements. 6 Guam Code Annot. § 613. the in-custody statements of Defendant Viloria were properly put before the jury and argued upon.

## PROSECUTORIAL COMMENT ON ALIBI

Defendant Viloria asserts that the prosecutor's comments on his alibi defense were reversible error and violative of his Sixth and Fourteenth Amendment rights for three reasons: (1) the prosecutor intentionally and falsely stated that Viloria hadn't asserted the defense before trial, (2) the use of his pre-trial silence as evidence against him violates due process, and (3) his counsel was disparaged as incompetent for failing to secure his release from jail based upon the alibi.

The alibi defense, that Viloria was at home at the time of the crimes, was his only defense. The Government at every turn sought to show that the alibi was recently fabricated. The core of Defendant's argument is that the prosecutor falsely, on several occasions, stated that Viloria had not asserted the alibi before trial when, in fact, he had filed his notice of alibi with the court on March 12, 1989, a week before the trial began.

Considering that the alleged crimes occurred on November 8, 1986, the three co-defendants were arrested in late May 1989, they were indicted on June 1, 1989, and the first trial began on March 19, 1990, the one week inaccuracy by the prosecutor was immaterial, a

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[3] See footnote 1, supra.

de minimus round-off error. To state that Viloria hadn't asserted the alibi before the first trial was false only in a hypertechnical sense, and did not mislead the jury.

Even as to the second trial, although an official notice of alibi had been signed for the first trial, Defendant Viloria did not call his wife to testify in support of the alibi at that trial. When arguing or questioning why Viloria hadn't brought up the alibi previously, there was no requirement to add a verbal footnote each time, "except for counsel's filing of notice a week before the first trial." Viloria's counsel was free to emphasize this filing if desired. The first time the Government heard certain alibi testimony by Mrs. Viloria about a domestic dispute, a birthday, and killing a snake in her home was when she testified at the second trial. The Government presented four rebuttal witnesses to the facts surrounding the asserted alibi defense. (TR Vol. IX, 60-88). The prosecutor's comments on the timing of his alibi defense to not violate due process. A testifying defendant who has waived his Miranda rights and spoken to the police can be impeached by his post-arrest silence that is inconsistent with his trial testimony. *People v. Lindsey*, 205 Cal.App.3d 112, 116 n.2, 252 Cal.Rptr. 96, 98 n.2 (1988). In *Lindsey*, where the conviction was reversed based upon prosecutorial comment on counsel's failure to assert the alibi, the defendant did not testify. Id. Of course a defendant who does not waive his Miranda rights and speak to the police, unlike this case, may not be impeached by that silence, since he is merely exercising his rights. *Doyle v. Ohio*, 426 U.S. 610, 96 S.Ct. 2240, 49 L.Ed. 2d 91 (1976); *People v. Galloway*, 100 Cal.App.3d 551, 160 Cal.Rptr. 914 (1979). Here, the use of Viloria's pre-trial silence is permissible and does not violate due process.

Like the prosecutor in *Lindsey*, the prosecutor here asked why Viloria's counsel had let him remain incarcerated rather than bring the evidence to the police or Attorney General, and said that if he had done so, he wasn't a very good lawyer. Viloria notes that here his attorney had filed a notice of alibi, and an attorney speaks for his client. *Lindsey*, 205 Cal.App.3d at 116-17, 252 Cal.Rptr. at 98. Although the timing of the notice is not critical, counsel is entitled to make tactical decisions free of prosecutorial attack on them.

> Additionally, the prosecutor's comments improperly disparaged defense counsel, implying counsel was incompetent in failing to reveal the alibi and thereby secure Lindsey's release from jail. This implication was unfair because it was based on the premise -- perhaps plausible to nonlawyers but absurd to any knowledgeable attorney — that the prosecutor would simply have dropped all charges merely because Lindsey's mother claimed he was at home in bed during the robbery. Alternatively, the comments improperly implied defense counsel did not believe the alibi or had participated in its fabrication. [Citation omitted.] [n.3] The prosecutor was not entirely to blame, as the court permitted the improper comments over defense counsel's objection.

*Lindsey*, 205 Cal.App.3d at 117, 252 Cal.Rptr. at 98. The Government in this case would have been even less likely to drop aggravated murder charges based on his wife's testimony than the robbery charge in *Lindsey*. This aspect of the prosecutorial comment on alibi is on all fours with *Lindsey*.

This error is of constitutional dimension and thus subject to the test for prejudice set forth in *Chapman v. California*, 386 U.S. 18, 24, 87 S.Ct. 824, 828, 17 L.Ed.2d 705, 710-11 (1967). The judgment must be reversed unless the error was harmless beyond a reasonable doubt.

The test is the importance of the issue to the defense, and whether the evidence against the defendant is less than overwhelming. *Lindsey*, 205 Cal.App.3d at 117, 252 Cal.Rptr. at 98. Here the alibi defense was vital. However, we do not agree with the defendants as to the degree of evidence against them.

Although prosecution witnesses recanted testimony, prior testimony was admitted. Two co-defendants who had pleaded guilty to the murders implicated their peers, and another witness testified as to their transportation to the scene. Other witnesses corroborated this testimony. While a prior hung jury may be taken into consideration. *U.S. v. Schuler*, 813 F.2d 978, 982 (9th Cir. 1987), it is not dispositive. The second jury found defendants guilty of all charges.

The improper remarks were not unduly prejudicial. Certainly, the prejudicial remarks did not so infect the trial with unfairness as to make the resulting conviction a denial of due process. *Darden v. Wainwright*, 477 U.S. 168, 106 S.Ct., 2464, 91 L.Ed.2d 144 (1986) (much more factually egregious); *Deutscher v. Whitley*, 884 F.2d 1152, 1157 (9th Cir. 1983) (same). Here, the trial judge gave a final instruction about the argument of counsel not being evidence. The remarks were not reversible error.

## ERRONEOUS CLOSING ARGUMENT

Defendant Viloria contends that his due process rights were violated by the prosecutor's erroneous comments during closing argument that impeachment evidence was "not the truth" and about his prior arrest record. Viloria had introduced the out-of-court statements of James Leon Guerrero and another witness to rebut testimony of Joseph Manibusan and the other two Government percipient witnesses. The judge gave a limiting instruction that these statements, which the court had excluded for the truth of the matters asserted, supra at 12-13, were admitted only for the purpose of showing that the Government witnesses did not have exclusive knowledge of the facts of the case or that persons who are strangers to the trial also knew facts about these crimes. The judge concluded:

> You were also further instructed that you may not consider whether or not these statements were made for the truth of the matter asserted. If one or another of these persons has implicated himself or third parties in his or her statement, you may not consider if those allegations are true. You may only consider the fact that strangers to the trial, individual "A" [James Leon Guerrero] and Cathy Burger, had information about this case that they had given to the authorities, and which may show that Government witnesses who have testified may not have had personal knowledge of the facts to which they have testified. Do not consider this evidence for any purpose except the limited purpose for which it is admitted.

The prosecutor in his rebuttal argument said, "Statement A is not put in for the truth of the matter asserted. That is not truth. The judge instructed you as such."

The statement "That is not truth," is not the same as "That is not the truth," or It is not true." If the latter meanings are given, a legitimate argument as to credibility becomes error when blessed with the court's imprimatur. The statement "That is not truth," could also mean, "That is not something put in for the truth of the matter asserted." However, the ambiguity makes the prosecutor's argument error.

A prosecutor's argument to the jury does not violate the Constitution unless it renders the Defendant's trial so fundamentally unfair as to deny him due process. A misstatement of the law can deny due process, but reversal is not warranted unless the misstatement prejudiced the proceeding. *Darden*, 477 U.S. 168, 106 S.Ct. 2464, 91 L.Ed.2d 144; *Deutscher*, 884 F.2d at 1152. Even the judge did not understand the prosecutor to mean that the impeachment was not true. TR Vol.X, 252. The erroneous comments on the impeachment statements are not so fundamentally unfair as to have prejudiced the entire proceeding. The fact that the Government witnesses were themselves criminals does not make the total evidence, the credibility of which was evaluated by the jury, any less overwhelming. In view of the entire transcript, particularly Volume X, the prosecutor's misstatement was harmless.

Evidence of a prior arrest or conviction is permissible for impeachment if the court determines that the probative value of admitting this evidence outweighs its prejudicial effect to the accused. 6 Guam Code Annot. § 609(a)(1). The judge admitted this evidence, but forbade mention of the arrest for the current charges. The judge's decision, and the prosecutor's reference to drug dealing and a 1977 grand theft, were not improper.

## JURY INSTRUCTIONS

During the jury instructions, the judge gave a standard reasonable doubt instruction but did not give an instruction that the jury must decide the case solely on the evidence presented in the second trial and must not consider the fact of the first trial in reaching a verdict.

The judge gave a standard reasonable doubt instruction based upon Guam law. TR Vol. X, 3:15-22, 238; 8 Guam Code Annot. § 90.23(a) (Criminal Procedure Code).[4] "In charging a jury, the court may read subsection (a) to the jury and no further instruction defining reasonable doubt need be given." 8 Guam Code Annot. § 90.23(b).

> Section 90.23(b) clearly gives a trial court in Guam neither the unbridled discretion to instruct the jury in any language it chooses, nor the liberty to embellish the statutory instruction. The statutory instruction reflects the Guam Legislature's choice of the definition which it felt best avoided the danger of confusing a jury on the matter of reasonable doubt, by constraining a trial judge in the formulation of an appropriate instruction.

*People of the Territory of Guam v. Yang*, 850 F.2d 507, 513 n.9 (9th Cir. 1988) (en banc).

During closing argument, counsel for Defendant Manibusan attempted to give part of an instruction similar to *California Jury Instructions, Criminal (CALJIC)* 2.01, ¶¶ 3-4 (5th ed. 1988). Neither party, including a criminal defendant, may insist upon any particular language. *U.S. v. Pallan*, 571 F.2d 497, 501 (9th Cir. 1978). Following *Yang*, however, a trial judge's discretion to use alternate wording is limited. The instruction must be a "moral certainty" standard rather than a "hesitate to act" standard. *Yang*, 850 F.2d at 513. To be safe, Guam judges often use the statutory wording verbatim, as here.

Title 8 Guam Code Annot. § 90.19 requires that proposed jury instructions be delivered to the court for approval before argument. The judge stated that the unapproved ["jury instruction"] statement

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[4] Title 8 Guam Code annot. § 90.23(a) provides: Reasonable doubt is defined as follows: "It is not a mere possible doubt because everything relating to human affairs, and depending on moral evidence, is open to some possible or imaginary doubt. It is that state of the case, which, after the entire comparison and consideration of all the evidence,e leaves the mind of the trier of fact in the condition that he cannot say he feels an abiding conviction to a moral certainty, of the truth of the charge."

of law on a chart referred to during Defendant Manibusan's closing argument was "not an accurate statement of the law." While *CALJIC* 2.01 is not incorrect as a matter of constitutional law, *U.S. v. James*, 576 F.2d 223, 227 n.3 (9th Cir. 1978), it was improper inasmuch as it was not the approved jury instruction for this jurisdiction or one submitted for this trial.

Moreover, the effect of the statement was overcome by the instruction actually read to the jury previously concerning reasonable doubt, which was clearly correct. Also, all three defense counsel went on to explain the reasonable doubt standard to the jury. One even mentioned the "hesitate to act standard." TR Vol. X, 194. Additionally, the judge's interruption was induced by defense counsel bringing before the jury an instruction other than the one approved by the court, which could have confused the jury. Thus, defense counsel invited the interruption. The court did not abuse its discretion in selecting the correct jury instruction to be used. The judge properly halted the presentation of an alternate jury instruction or potentially confusing statement of law. Although stating that counsel's demonstrative charge regarding reasonable doubt was "not an accurate statement of the law" was not the best choice of words, in view of the undisputedly correct instructions given to the jury, this misstatement does not amount to reversible error.

The court also did not give an instruction that the jury must decide the case solely on the evidence presented in the second trial and must not consider the fact of the first trial in reaching a verdict. *Manual of Model Criminal Jury Instructions for the Ninth Circuit* § 2.09 (West 1989). This instruction should not be given unless specifically requested by the defendant. Id. Here, the defendants did not make such a request, the prosecution did. At any rate, such an instruction may well have confused the jury, as much of the evidence was taken from that trial.[5] An additional explanation would have been needed to distinguish the fact of the first trial from the evidence in the first trial, to make clear that the latter had been incorporated into the second trial. There was no error in failing to give this instruction not requested by any defendant.

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[5] After several Government witnesses recanted, their testimony from the first trial was read into the record without objection.

## CONCLUSION

With the exception of the prosecutor's intentional disparagement of counsel regarding the alibi and his misstatement that impeachment statements "were not the truth," the argument presented was not improper. The statements and evidentiary rulings of the judge were not clearly erroneous nor abusive of discretion. Indeed, a de novo review would have brought the same results. Under the *Chapman* standard the prosecutor's errors were harmless beyond a reasonable doubt. The convictions are AFFIRMED.

/s/ Alex R. Munson
ALEX R. MUNSON
District Judge

/s/ Alfred T. Goodwin
ALFRED T. GOODWIN
Circuit Judge

/s/ M.D. Crocker
M.D. CROCKER
District Judge

APPENDIX D

IN THE SUPERIOR COURT OF GUAM
TERRITORY OF GUAM

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Criminal Case No. CF 145-89

PEOPLE OF THE TERRITORY OF GUAM

vs.

DANIEL L. TURNER,
MARTIN M. VILORIA,
JOHN G. MANIBUSAN,

*Defendants.*

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JUDGMENT
[Filed October 23, 1990]

WHEREAS, on the 1st day of June, 1989, an indictment was filed charging defendants with: Aggravated Murder (First Degree Felony) (2 Counts); Aggravated Murder (First Degree Felony) (4 Counts); Robbery (Second Degree Felony); Burglary (Second Degree Felony) and Possession and Use of a Deadly Weapon in the Commission of a Felony (3 Counts) committed on or about the 8th day of November, 1986 in the Territory of Guam and on arraignment the defendants pleaded not guilty to the charges and demanded a jury trial.

WHEREAS, ON THE 9th day of July, 1990, the jury having been impanelled and the trial having been regularly had and by the verdict of the jury on July 27, 1990, found the defendants Daniel L. Turner, Martin M. Viloria and John G. Manibusan guilty of the offenses of: Charge One, Aggravated Murder (First Degree Felony) (2 Counts); Charge Two, Aggravated Murder (First Degree Felony) (4 Counts); Charge three, Robbery (Second Degree Felony); Charge four, Burglary (Second Degree Felony); and Charge five, Possession and Use of a Deadly Weapon in the commission of a Felony, Count 2.

The defendants appeared on September 20, 1990 for sentencing.

WHEREFORE, IT IS HEREBY ORDERED AND ADJUDGED BY THE COURT that:

For the offenses of Aggravated Murder, (First Degree Felony) (2 Counts) and Aggravated Murder, (First Degree Felony) (4 Counts), the defendants, Daniel L. Turner, Martin M. Viloria and John G. Manibusan are sentenced to life imprisonment without the possibility of parole, probation, work release or education outside the confines of the prison.

For the offense of Robbery (First Degree Felony), the defendants, Daniel L. Turner, Martin M. Viloria and John G. Manibusan are sentenced to ten (10) years confinement at the Department of Corrections with three (3) years special parole. This sentence shall run concurrently with the above sentence.

For the offense of Burglary (Second Degree Felony), the defendants, Daniel L. Turner, Martin M. Viloria and John G. Manibusan are sentenced to ten (10) years confinement at the Department of Corrections with three (3) years special parole. This sentence shall run concurrently with the above sentences.

For the offense of Possession and Use of a Deadly Weapon in the Commission of a Felony (2 Counts), the defendants, Daniel L. Turner, Martin M. Viloria and John G. Manibusan are sentenced to twenty (20) years confinement at the Department of Corrections. This sentence shall run consecutively to all of the above sentences.

Dated this 23rd day of October, 1990.

/s/ Peter C. Siguenza, Jr.
PETER C. SIGUENZA, JR.
JUDGE, SUPERIOR COURT OF GUAM

# APPENDIX E

## STATUTORY PROVISIONS INVOLVED

### ORGANIC ACT OF GUAM
### 48 USC §§ 1421 et seq.

**§ 1424. District Court of Guam; local courts; jurisdiction**

**(a) District Court of Guam; local courts**

The judicial authority of Guam shall be vested in a court of record established by Congress, designated the "District Court of Guam," and such local court or courts as may have been or shall hereafter be established by the laws of Guam in conformity with section **1424-1** of this title.

**(b) Jurisdiction**

The District Court of Guam shall have the jurisdiction of a district court of the United States, including, but not limited to, the diversity jurisdiction provided for in section 1332 of Title 28, and that of a bankruptcy court of the United States.

**(c) Original jurisdiction**

In addition to the jurisdiction described in subsection (b) of this section, the District Court of Guam shall have original jurisdiction in all other causes in Guam, jurisdiction over which is not then vested by the legislature in another court or other courts established by it. In causes brought in the district court solely on the basis of this subsection, the district court shall be considered a court established by the laws of Guam for the purpose of determining the requirements of indictment by grand jury or trial by jury.

**§1424-1. Local courts; composition; appellate court; jurisdiction; practice and procedure; qualifications and duties of judges**

**(a) Composition; establishment of appellate court**

The local courts of Guam shall consist of such trial court or courts as may have been or may hereafter be established by the laws of Guam. On or after the effective date of this Act, the legislature of Guam may in its discretion establish an appellate court.

**(b) Jurisdiction**

The legislature may vest in the local courts jurisdiction over all causes in Guam over which any court established by the Constitution and laws of the United States does not have exclusive jurisdiction. Such jurisdiction shall be subject to the exclusive or concurrent jurisdiction conferred on the District Court of Guam by section **1424(b)** of this title.

**(c) Practice and procedure; qualifications and duties of judges**

The practice and procedure in the local courts and the qualifications and duties of the judges thereof shall be governed by the laws of Guam and the rules of those courts.

**§ 1424-2. Relations between courts of United States and courts of Guam; review by United States Court of Appeals for Ninth Circuit; reports to Congress; rules**

The relations between the courts established by the Constitution or laws of the United States and the local courts of Guam with respect to appeals, certiorari, removal of causes, the issuance of writs of habeas corpus, and other matters or proceedings shall be governed by the laws of the United States pertaining to the relations between the courts of the United States, including the Supreme Court of the United States, and the courts of the several States in such matters and proceedings: *Provided*, That for the first fifteen years following the establishment of the appellate court authorized by section **1424-1(a)** of this title, the United States Court of Appeals for the Ninth Circuit shall have jurisdiction to review by writ of

certiorari all final decisions of the highest court of Guam from which a decision could be had. The Judicial Council of the Ninth Circuit shall submit reports to the Committee on Energy and Natural Resources of the Senate and the Committee on Interior and Insular Affairs of the House of Representatives at intervals of five years following the establishment of such appellate court as to whether it has developed sufficient institutional traditions to justify direct review by the Supreme Court of the United States from all such final decisions. The United States Court of Appeals for the Ninth Circuit shall have jurisdiction to promulgate rules necessary to carry out the provisions of this subsection.

**§ 1424-3. Appellate jurisdiction of District Court; procedure; review by United States Court of Appeals for Ninth Circuit; rules; appeals to appellate court**

**(a) Appellate jurisdiction of District Court**

Prior to the establishment of the appellate court authorized by section **1424-1(a)** of this title, the District Court of Guam shall have such appellate jurisdiction over the local courts of Guam as the legislature may determine: *Provided*, That the legislature may not preclude the review of any judgment or order which involves the Constitution, treaties, or laws of the United States, including this chapter, or any authority exercised thereunder by an officer or agency of the Government of the United States, or the conformity of any law enacted by the legislature of Guam or of any orders or regulations issued or actions taken by the executive branch of the government of Guam with the Constitution, treaties, or laws of the United States, including this chapter, or any authority exercised thereunder by an officer or agency of the United States.

**(b) Appellate division of District Court; quorum; presiding judge; designation of judges; decisions**

Appeals to the District Court of Guam shall be heard and determined by an appellate division of the court consisting of three judges, of whom two shall constitute a quorum. The district judge shall be the presiding judge of the appellate division and shall preside therein unless disqualified or otherwise unable to act. The other judges who are to sit in the appellate division of any session shall

be designated by the presiding judge from among the judges who are serving on, or are assigned to, the district court from time to time pursuant to section **1424b** of this title: *Provided*, That no more than one of them may be a judge of a court of record of Guam. The concurrence of two judges shall be necessary to any decision of the appellate division of the district court on the merits of an appeal, but the presiding judge alone may make any appropriate orders with respect to an appeal prior to the hearing and determination thereof on the merits and may dismiss an appeal for want of jurisdiction or failure to take or prosecute it in accordance with the applicable law or rules of procedure.

**(c) United States Court of Appeals for Ninth Circuit; jurisdiction; appeals; rules**

The United States Court of Appeals for the Ninth Circuit shall have jurisdiction of appeals from all final decisions of the appellate division of the district court. The United States Court of Appeals for the Ninth Circuit shall have jurisdiction to promulgate rules necessary to carry out the provisions of this subsection.

**(d) Appeals to appellate court; effect on district court**

Upon the establishment of the appellate court provided for in section **1424-1(a)** of this title all appeals from the decisions of the local courts not previously taken must be taken to the appellate court. The establishment of that appellate court shall not result in the loss of jurisdiction of the appellate division of the district court over any appeal then pending in it. The rulings of the appellate division of the district court on such appeals may be reviewed in the United States Court of Appeals for the Ninth Circuit and in the Supreme Court notwithstanding the establishment of the appellate court.

## CERTIFICATE OF MAILING

I, J. ANDREW ARTERO-BONAME, hereby certify that on Monday, the 24th day of May, 1993, I caused three copies of the foregoing PETITION FOR WRIT OF CERTIORARI to be served upon Respondents, by depositing same in the United States Mail, first class postage pre-paid, addressed to Respondents' counsels of record, at their last known address as follows:

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Dated this 24th day of May, 1993.

J. ANDREW ARTERO-BONAME
Assistant Attorney General

SUBSCRIBED AND SWORN to before me this 24th day of May, 1993.

CYNTHIA M. REKDAHL
NOTARY PUBLIC
In and for the Territory of Guam
My Commission expires: Mar. 25, 1996